No. 12-3670

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GILBERTO ERNESTO EDWARDS,

Appellee,

v.

TONY BRYSON, District Director USCIS Philadelphia, *et al.*,

Appellants.

APPELLANTS' OPPOSITION TO APPELLEE'S PETITION FOR *EN BANC* REHEARING

Appellants hereby oppose Gilberto Ernesto Edwards' ("Edwards") Petition for *En Banc* Rehearing ("Reh. Pet."). Edwards does not satisfy the requirements for rehearing *en banc* set forth in Rule 35 of the Federal Rules of Appellate Procedure.[1] *En banc* review is intended to bring to the attention of the entire Court an opinion that conflicts with prior Supreme Court or Third Circuit precedent or that presents an issue of exceptional importance. *See* Fed. R. App. P. 35(b)(1); *see also United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960).

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[1] Edwards makes no request or argument for rehearing by panel. *See generally* Reh. Pet.

Edwards' petition should be denied because it satisfies neither of these requirements.

Edwards' principal argument is that this Court's decision in *United States v. Moreno*, 727 F.3d 255 (3d Cir. 2013), interpreting 22 U.S.C. § 2705, on which the panel relied, was incorrectly decided. This argument does not warrant *en banc* review because, among other reasons, Edwards would not prevail under any interpretation of this statute. It does not matter what is the legal effect of a valid and unexpired passport under § 2705; at all relevant times Edwards' passport was expired.

In sum, *en banc* review is not appropriate because the question of statutory interpretation that Edwards wants the entire Court to address has no bearing on the outcome of the actual case or controversy that was before the panel.

ARGUMENT

I. EDWARDS' PETITION DOES NOT SATISFY THIS COURT'S CRITERIA FOR REHEARING *EN BANC*.

Edwards' petition fails at the outset to meet the requirements of the Court's Local Rule 35.1. This rule requires that a petition for rehearing *en banc* state that "the panel's decision is contrary to a decision of this court or the Supreme Court" or that "this appeal involves a question of exceptional importance." Third Cir. L.A.R. 35.1. Edwards' petition omits this required statement, asserting only that

the panel's decision "is contrary to the law of the United States" and contains "two prejudicial errors of fact." Reh. Pet. 1.

This omission is not merely a formal defect: Edwards *could not* make the required statement because the panel's decision does not conflict with any precedent of this Court or the Supreme Court, and because this unusual case does not present any question of exceptional importance. Edwards' claims of error regarding *Moreno* simply do not raise any issue meriting *en banc* rehearing. *See* Fed. R. App. P. 35(b)(1); Third Cir. L.A.R. 35.1.

II. EDWARDS' CHALLENGE TO *MORENO*'S INTERPRETATION OF SECTION 2705 DOES NOT WARRANT *EN BANC* REVIEW BECAUSE EDWARDS WOULD NOT PREVAIL UNDER ANY INTERPRETATION OF THE STATUTE.

Edwards' primary argument for rehearing *en banc* is that *Moreno* was wrong to conclude that 22 U.S.C. § 2705 makes a passport "conclusive proof of citizenship only if its holder was actually a citizen of the United States when it was issued." 727 F.3d at 261. Edwards argues that the *en banc* Court should adopt the interpretation of the statute set forth in Judge Smith's dissenting opinion, which would have held that Section 2705 makes a passport conclusive proof of citizenship without "requir[ing] a preliminary showing that the passport holder is a U.S. citizen." *Id.* at 264 (Smith, J., dissenting). As explained below, *see infra* Part III, the government believes that *Moreno* reached the correct result in the context of that criminal case, but acknowledges that, in some other circumstances, a valid,

unexpired passport can be used to prove citizenship without a preliminary showing that the holder is a United States citizen. But this question has no bearing on the proper outcome in this case because Section 2705 prescribes the evidentiary force of a passport only "during its period of validity." Here, Edwards' passport was *expired* at all relevant times, and thus entitled to no weight under any interpretation of Section 2705. And because Edwards could not prevail even if the *en banc* Court adopted the interpretation of the statute Judge Smith advocated in his *Moreno* dissent, *en banc* review is not warranted.

Edwards filed a suit pursuant to 8 U.S.C. § 1503 seeking a declaratory judgment that he is a United States citizen. A plaintiff in a § 1503 action bears the initial burden of establishing his citizenship by a preponderance of the evidence. *Delmore v. Brownell*, 236 F.2d 598, 600 (3d Cir. 1956). Edwards contends that under Section 2705, his 1991 passport not only carries that initial burden, but also conclusively establishes that he is a citizen. But Edwards' passport expired in December 2001 — nearly ten years before he filed this case. Section 2705 thus has no bearing on the proper outcome here because, by its plain terms, the statute prescribes the "force and effect" of a passport as proof of U.S. citizenship only "during its period of validity." Accordingly, even if Edwards were correct that Section 2705 means that an *unexpired* passport must be treated as conclusive proof of citizenship, the statute says nothing about the evidentiary weight to be given to a passport that has expired.

Edwards makes much of the fact that his passport was unexpired when he initially applied for a certificate of citizenship in 2001. *See* Reh. Pet. at 11-12. But a passport is a document of limited validity and duration and the date of application is not the relevant date in this action. A suit for a declaratory judgment of citizenship under § 1503 is a "trial de novo," not a review of the administrative record underlying the agency decision that gave rise to the suit. *Delmore*, 236 F.2d at 599 n.1. For purposes of this appeal, therefore, the point in time at which Edwards sought to invoke "the force and effect" of his passport as "proof of United States citizenship," 22 U.S.C. § 2705, was during the proceedings in the district court. And at that point, Section 2705 was plainly inapplicable because the passport had been expired for a decade.

Moreover, even if Edwards were correct that the relevant question is the status of his passport during administrative proceedings, his passport was also long expired by the time USCIS denied his application. Edwards points to no statute that would require USCIS to honor an expired passport simply because it had not yet expired at the time an application for a citizenship certificate was initially filed, and such a rule would make little sense. USCIS generally treats a valid, unexpired passport as proof of citizenship sufficient to justify the issuance of a certificate of citizenship. But when USCIS receives an application for a certificate of citizenship based on a passport that it concludes has been issued in error, it consults with the State Department to give the State Department an opportunity to

investigate the matter and, if appropriate, cancel the passport. This is consistent with the State Department's broad statutory authority to "cancel any United States passport" — and thus deprive the passport of force and effect as proof of citizenship under § 2705 — whenever the agency determines "that such document was illegally, fraudulently, or erroneously obtained." 8 U.S.C. § 1504(a). By focusing exclusively on the status of the passport at the time an application for a certificate of citizenship is filed, Edwards would apparently require USCIS to issue a certificate of citizenship based on a passport that the State Department itself had subsequently canceled after finding that it had been issued in error — or, as in this case, a passport that the State Department could not cancel because it had already expired. The statute provides no basis for that bizarre result. An applicant seeking a certificate of citizenship based on a passport with an approaching expiration date can preserve the passport's force and effect simply by renewing the passport — something that Edwards never attempted to do here.

III. ALTHOUGH *MORENO* REACHED THE CORRECT RESULT ON THE FACTS OF THAT CRIMINAL CASE, AN UNEXPIRED PASSPORT HAS INDEPENDENT FORCE AS PROOF OF CITIZENSHIP IN SOME OTHER CONTEXTS.

Because Section 2705 has no bearing on the evidentiary weight of Edwards' expired passport, this case presents no occasion to reconsider *Moreno*'s interpretation of the statute. Moreover, *Moreno* correctly concluded that nothing in Section 2705 precludes the criminal prosecution of a passport holder for falsely

claiming to be a U.S. citizen in violation of 18 U.S.C. § 911. But as the government explained in its opposition to the pending petition for certiorari in *Moreno*, § 2705 does require that a valid, unexpired passport be given independent effect as proof of citizenship in some contexts, and this Court in *Moreno* wrote too broadly to the extent it suggested otherwise. *See* Brief for the United States in Opposition at 7-15, *Moreno v. United States*, No. 13-457, 2014 WL 108364 (U.S. Jan. 10, 2014).

Section 2705 links the "force and effect" of a passport to the "force and effect" of "certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." Such certificates, in turn, are conclusive proof of citizenship in administrative proceedings and against third parties. The government has long taken the position that, in general, "a decree of naturalization or a certificate of naturalization is not subject to impeachment in a collateral proceeding." 41 Op. Att'y Gen. 452, 459 (1960) (citing cases). Such certificates are thus conclusive when questions concerning citizenship arise in private litigation. *See, e.g., Campbell v. Gordon*, 10 U.S. (6 Cranch) 176, 182 (1810). A facially valid certificate of citizenship or naturalization is also conclusive proof of citizenship in administrative proceedings. In 1960, for example, the Attorney General concluded that the State Department was bound to accept a certificate of citizenship issued by the Immigration and Naturalization Service ("INS"). *See* 41 Op. Att'y Gen. at 459-461; *see also In re Mendiola*, 647

F. Supp. 839, 841-842 (S.D.N.Y. 1986) (holding that INS was required to accept as proof of citizenship a certificate of citizenship issued by the Attorney General).

Although a certificate of citizenship or naturalization is thus conclusive proof of citizenship in many circumstances, it does not bind the government "for all purposes." *Johannessen v. United States*, 225 U.S. 227, 236 (1912). For example, the Department of Justice is authorized by statute to bring a suit to "revok[e] and set[] aside the order admitting [a] person to citizenship and cancel[] the certificate of naturalization." 8 U.S.C. § 1451(a). In addition, the Department of Homeland Security is authorized to cancel an administrative certificate of citizenship or naturalization whenever it finds "that such document or record was illegally or fraudulently obtained." 8 U.S.C. § 1453. And the government may also pursue a criminal prosecution predicated on the defendant's non-citizenship or ineligibility for naturalization even if it does not first cancel the defendant's certificate of citizenship or naturalization. *See, e.g., United States v. Chin Doong Art*, 180 F. Supp. 446, 447 (E.D.N.Y. 1960) (rejecting a claim that the government was required to revoke the defendants' certificates of citizenship before prosecuting them for "falsely represent[ing] themselves to be citizens").

Section 2705 provides that, "during its period of validity," a passport must be given the same force and effect as a certificate of citizenship or naturalization. As Edwards observes, some authorities have concluded that § 2705 means that a "valid United States passport" must be treated as "conclusive proof" of citizenship

"in administrative immigration proceedings." *In re Villanueva*, 19 I. & N. Dec. 101, 103 (1984); *Keil v. Triveline*, 661 F.3d 981, 987 (8th Cir.2011); *see also United States v. Clarke*, 628 F. Supp. 2d 15, 21 (D.D.C. 2009) (a valid passport precludes a private party from challenging the holder's citizenship). The government agrees that in the context of administrative proceedings and vis-à-vis third parties, a valid passport can be invoked as proof of citizenship without a preliminary showing that the holder is a citizen.[2]

But these precedents provide no assistance to Edwards — and no reason to grant rehearing in this case — because they speak to the force of "valid" passports. *Villanueva*, 19 I. & N. Dec. at 103. And these authorities also do not call into question the result reached in *Moreno* because they address the force and effect of passports in administrative proceedings and against third parties, not criminal prosecutions. Section 2705 only requires that a passport be given "the same force

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[2] *Moreno* suggested that such a preliminary showing is required because § 2705 applies only to a passport "issued by the Secretary of State to a citizen of the United States." *See* 727 F.3d at 260 ("Under the language of the statute, the logical premise needed to establish conclusive proof of citizenship consists of two independent conditions: (1) having a valid passport and (2) being a U.S. citizen."). But as Judge Smith's dissent explained, that interpretation would deprive the statute of much of its practical effect. *See id.* at 263-64 (Smith, J., dissenting). Instead, the statutory requirement that the passport must have been issued "to a citizen of the United States" operates to exclude the narrow category of passports issued to noncitizen nationals. *See id.* at 264; *see also* 125 Cong. Rec. 25,267, 25,268 (1979) (State Department letter proposing the text that ultimately became § 2705 and explaining that the proposed legislation "is concerned with the U.S. passport which is issued to United States citizens" and that "U.S. passports issued to nationals of the United States are not included in the draft bill").

and effect" as a certificate of citizenship or naturalization, and, as explained above, the government is not required to revoke such a certificate before prosecuting the holder for falsely claiming to be a citizen. *See also Keil*, 661 F.3d at 987 ("[N]o court has held that possession of a passport precludes prosecution under § 911 [for falsely claiming to be a citizen], and there are indications in the case law that it does not.").

IV. EDWARDS' REMAINING ARGUMENTS LACK MERIT.

Edwards also claims that the government should be required to recognize "even an incorrectly issued document" on the theory of collateral estoppel, and relies on *Chehazeh v. Att'y Gen. of U.S.*, 666 F.3d 118 (3d Cir. 2012), in support thereof. Reh. Pet. at 8. However, Edwards' reliance on *Chehazeh* is entirely misplaced. *Chehazeh* involved the Board of Immigration Appeals' reopening *sua sponte* the case of a Syrian national who had previously received a grant of asylum from an immigration judge after he was placed in removal proceedings. *Chehazeh*, 666 F.3d at 122-25. This Court ruled that government had tried to "re-run [Chehazeh's] removal proceedings" and remanded the case the District Court "to consider whether the [Board of Immigration Appeals'] decision to reopen Chehazeh's removal proceedings was warranted by an exceptional situation." *Id.* at 138, 141 (internal citations omitted).

There is no similar circumstance in Edwards' case such that the general and prevailing rule that collateral estoppel cannot be applied against the government in

this context should be rejected. *See INS v. Pangilinan*, 486 U.S. 875, 882 (1988) ("Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [Constitutional] limitations."); *see also, e.g., Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (holding that allowing estoppel to be applied against the government would interfere with its ability to carry out government functions); *but see DiPeppe v. Quarantillo*, 337 F.3d 326, 335 (3d Cir. 2003) (establishing four-part test for equitable estoppel against the government, but requiring a showing of "affirmative misconduct" on the part of a government official).

Despite Edwards' claim, in no way is the government "relitigat[ing]" his case. Reh Pet. at 10. Unlike in *Chehazeh,* where the foreign national had gone through removal proceedings — litigation — and succeeded only to have the agency, on its own, reopen the matter to litigate it again, Edwards has only been involved in *this* litigation. *Chehazeh*, 666 F.3d at 138. He received a passport through simple government processing and no litigation ever began until his N-600 application was denied and he filed suit in the District Court, seeking *de novo* review. *See* 8 U.S.C. § 1503. And, in any event, the Court did not hold in *Chehazeh* that the agency could never re-examine an issue previously litigated; it

remanded the case to be sure the agency had adequate reason to do so. 666 F.3d at 141. Edwards' arguments for estoppel are unpersuasive.[3]

CONCLUSION

In sum, this Court "strictly follows" Rule 35 of the Federal Rules of Appellate Procedure. Third Cir. L.O.P. 9.3.1. "[R]ehearing en banc is not favored and will not be ordered unless consideration by the full [C]ourt is necessary to secure or maintain uniformity of its decisions or the proceeding involves a question of exceptional importance." *Id.* Edwards has failed to show that the Panel's decision conflicts with Third Circuit or Supreme Court case law, and he has failed to show that this is an issue of exceptional importance. *See* Fed. R. App. P. 35(b)(1)(A)-(B). The Court should deny the petition for *en banc* rehearing, because "[t]he function of *en banc* hearings is not to review alleged errors for the benefit of losing litigants," which, ultimately, is what Edwards seeks here. *U.S. v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (citing *Western Pacific R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 256-59 (1953)). Should the Court grant rehearing, however, Appellants request the opportunity for supplemental briefing.

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[3] Edwards also argues that doctrine of "laches" should apply to this case, but does not cite any case from this Circuit in supported of his claim. Reh. Pet. at 9-10.

Respectfully submitted,

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Dated: January 17, 2014

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, including opposing counsel.

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